

Interstate Recognition of Same-Sex Civil Unions After *Lawrence v. Texas*

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The State of Massachusetts recently recognized same-sex marriages. As a result, the question presents itself whether (and, if so, when) other states have to recognize these marriages. This Article argues that after the Supreme Court's landmark decision in Lawrence v. Texas, which invalidated Texas's homosexual sodomy law, a blanket non-recognition of Massachusetts same-sex marriages by other states is unconstitutional.

I. INTRODUCTION

Will Massachusetts same-sex marriages be recognized in other states? Before *Lawrence v. Texas*,¹ in which the Supreme Court invalidated Texas's law against homosexual sex, this question would have been almost entirely unconstrained by constitutional law. After *Lawrence*, all states are constitutionally required to recognize such marriage under some circumstances.

The basic facts are familiar. Same-sex marriage has finally arrived on American shores. Massachusetts now recognizes such marriages,² and increasing numbers of same-sex couples have married. Other states have virtually the same status: Vermont recognizes "civil union[s],"³ and California recognizes "domestic partners[h]s,"⁴ that have virtually all the rights of marriage.⁵ Among the questions to which this gives rise is whether the status is exportable.

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¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

² See Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003).

³ VT. STAT. ANN. tit. 15, § 1204 (2002) (grants "[p]arties to a civil union all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

⁴ The California statutes declare that:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

CAL. FAM. CODE § 297.5(a) (West 2003 & Supp. 2004). The only distinction from Vermont is that California domestic partners, in filing state income tax returns, "shall use the same filing status as is used on their federal tax returns." *Id.* at § 297.5(g). This proviso was added because legislators feared that conflicting tax codes would make same-sex households more likely to be

Many people have confusedly thought, and some still think, that the Full Faith and Credit Clause of the Constitution⁶ requires states to recognize marriages from other states. But this has never been the law. The Clause requires states only to recognize other states' judgments, rendered after adversarial proceedings.⁷ There is almost no authority for the proposition that "full faith and credit" applies to marriage,⁸ and there is a great deal of authority to the contrary, indicating that states may decline to recognize foreign marriages when those marriages are contrary to the strong public policy of the forum state.⁹

American choice-of-law doctrine with respect to marriage recognition has depended on a heavily fact-specific weighing of incommensurable considerations. Courts have balanced the forum's public policy interest against the interests of other states in effectuating their own marriage laws and the interests of the parties in having their marriages recognized. The outcome has usually been recognition. There is, however, a notable body of law in which recognition has often been denied. These cases have involved differences in state laws concerning incest (for example, marriages of first cousins), marriageable age, remarriage after divorce, and above all, interracial marriage (until the Supreme Court struck down all restrictions on those marriages).¹⁰

These older cases weigh against a *blanket* rule of non-recognition for same-sex marriage, even where states have a public policy against recognizing such marriages, and even where that public policy is codified by statute. Such a blanket rule was not adopted even in the interracial marriage cases, in which the Southern states had an exceedingly strong policy against recognition. In every such case

audited. Lisa Leff, *Domestic-Partners Bill Signed by Davis*, DESERET MORNING NEWS, Sept. 20, 2003, available at <http://deseretnews.com/dn/print/1,1442,515033198,00.html>.

⁵ For economy, I will refer to both statuses hereinafter as civil unions.

⁶ The Full Faith and Credit Clause of the Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

⁷ See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 17 (1997) [hereinafter Koppelman, *DOMA*]; Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 B.Y.U. L. REV. 1235, 1246-49 (2001).

⁸ Koppelman, *DOMA*, *supra* note 7, at 10-15; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 971 n.183 (1998) [hereinafter Koppelman, *Public Policy*]. Both of these articles are reprinted in an abridged and slightly revised form in ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICA* (2002) [hereinafter KOPPELMAN, *GAY RIGHTS QUESTION*].

⁹ Koppelman, *Public Policy*, *supra* note 8, at 946-62; Note, *Developments in the Law - The Law of Marriage and Family: Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003) [hereinafter *Harvard Note*].

¹⁰ Koppelman, *Public Policy*, *supra* note 8, at 941, 946-49.

that did not involve cohabitation within the forum, and in some that did, the Southern courts recognized interracial marriages.¹¹

There is no legal basis for treating same-sex marriages in an unprecedentedly harsh fashion. The solution that is most consistent with existing choice of law rules is one in which states can control the marriages of their own domiciliaries—citizens of Massachusetts are controlled by Massachusetts law and those of Alabama by Alabama law—in both cases, regardless of whether they temporarily travel into a different jurisdiction with different marriage rules.

I have made this argument in the past as an interpretation of common law conflicts doctrine.¹² I emphasized that I was not making a constitutional argument.¹³ I was not then, but I am now.

After *Lawrence v. Texas*, states are barred from treating gay people in an unprecedentedly harsh way. There is no precedent for a blanket rule of non-recognition of same-sex relationships. All states are thus constitutionally required to recognize at least some such relationships. Most prominently, the marriages of same-sex couples domiciled in Massachusetts and the civil unions of same-sex couples domiciled in Vermont and California have a powerful claim to recognition, under some circumstances, everywhere in the United States.

Part I of this article describes the choice of law rules governing interstate marriage recognition. Part II examines *Lawrence* and offers an interpretation of the rule that it lays down. Part III applies the rule of *Lawrence* to the choice of law question, and concludes that a blanket rule of non-recognition of same-sex civil unions, in any state, would be unconstitutional.

II. CHOICE OF LAW AND MARRIAGE RECOGNITION

Because different states have different rules concerning who may marry, the question of a marriage's validity may raise an issue of conflict of laws—that is to say, an issue in which a court must decide “whether or not and, if so, in what way, the answer to a legal question will be affected because the elements of the problem have contacts with more than one jurisdiction.”¹⁴ In conflicts cases, the

¹¹ See *infra* notes 29–31 and accompanying text.

¹² See Koppelman, *DOMA*, *supra* note 7, at 20; Koppelman, *Public Policy*, *supra* note 8, at 933.

¹³ See Koppelman, *Public Policy*, *supra* note 8, at 933. DOMA is unconstitutional, but that conclusion has little effect on states' freedom to craft their own laws. The only effect that DOMA has on choice of law rules is to authorize states to deny recognition to same-sex marriage when such denial would violate due process, or when it would nullify final judgments from other states. Congress surely did not intend this result, but DOMA is a poorly conceived and drafted statute. See generally Koppelman, *DOMA*, *supra* note 7.

¹⁴ RUSSEL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW 1 (3d ed. 1986).

"overwhelming tendency"¹⁵ is to validate marriages, but the courts have frequently recited an exception in cases where recognition would violate the strong public policy of the forum state.

This area of the law has become somewhat archaic, because the public policy exception to marriage recognition has been invoked primarily in three contexts:¹⁶ polygamy, incest, and miscegenation.¹⁷ The first two were always misnomers to some extent. No state ever recognized polygamy.¹⁸ Nor did any state ever violate the core instances of the incest taboo by legalizing parent-child or sibling marriages. The incest cases involved marriages between aunts and nephews, uncles and nieces, first cousins or even more remote relations.¹⁹

Interracial marriage aroused the strongest passions in the courts, whose "opinions can be arranged along a discomfort continuum, with polygamy being the least offensive, incest falling in the middle and miscegenation giving courts the greatest amount of consternation."²⁰ In 1967, the Supreme Court declared unconstitutional every miscegenation prohibition in the country, thereby eliminating any conflict of laws with respect to that issue.²¹ Since that time, there has not been any comparably severe moral conflict among the states with respect to marriage. Until now.

Thirty-seven states have laws on the books declaring that they will not recognize same-sex marriages, and that such marriages are contrary to their public

¹⁵ WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 362 (2d ed. 1993).

¹⁶ There have also been cases involving differences in age restrictions and rules concerning remarriage after divorce.

¹⁷ I will not put scare quotes around this word, but use it with the same caveats set forth by Peggy Pascoe:

Many scholars avoid using the word *miscegenation*, which dates to the 1860s, means race mixing, and has, to twentieth-century minds, embarrassingly biological connotations; they speak of laws against "interracial" or "cross-cultural" relationships. Contemporaries usually referred to "anti-miscegenation" laws. Neither alternative seems satisfactory, since the first avoids naming the ugliness that was so much a part of the laws and the second implies that "miscegenation" was a distinct racial phenomenon rather than a categorization imposed on certain relationships. I retain the term *miscegenation* when speaking of the laws and court cases that relied on the concept, but not when speaking of people or particular relationships.

Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 48 n.11 (1996) [hereinafter Pascoe, *Miscegenation Law*].

¹⁸ See Koppelman, *Public Policy*, *supra* note 8, at 946-48.

¹⁹ *Id.* at 948.

²⁰ Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 573 (1994).

²¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

policy. They present a significant obstacle to the recognition of same-sex marriages from Massachusetts. It is less clear whether most are even relevant to the recognition of civil unions from other states, since almost all of them use the word "marriage" to describe what they are denying to same-sex couples.²² Nonetheless, some of them have very strong language, describing same-sex marriages as "void" or "prohibited."²³ These provisions are widely understood as enacting a blanket rule of non-recognition, under which states would "ignore marriage licenses granted to same-sex couples in other states."²⁴ That rule might be held by implication to reach civil unions as well. Under the blanket non-recognition rule, a state's courts would never recognize any same-sex marriage for any purpose whatsoever. Those who have proposed this rule do not seem to have understood just how unprecedented a measure they are proposing.

The closest historical analogue to the radical moral disagreement over same-sex relationships is the divide between states that permitted and those that forbade marriage between whites and blacks. For this reason, the miscegenation cases deserve particularly close examination. Miscegenation prohibitions were in force as early as the 1660s, but only after the Civil War did they begin to function as a central sanction in the system of white supremacy. At one time forty-one American states and colonies enacted laws prohibiting marriage between whites and blacks.²⁵

The miscegenation taboo was held in the Southern states with great tenacity; it was close to the psychological core of racism.²⁶ "[A]lthough such marriages were infrequent throughout most of U.S. history, an enormous amount of time

²² The only one of these provisions that contemplates civil unions is Nebraska's, stating that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST., art. I, § 29 (adopted 2000).

²³ Koppelman, *Public Policy*, *supra* note 8, at 965–70; *see also* my compilation of the statutes in Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIAC L. REV. 105 (1996), which will shortly be updated in an appendix to Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. (forthcoming 2005) [hereinafter Koppelman, *Interstate Recognition*].

²⁴ This formulation appears in two executive orders issued a few days apart by Governors Kirk Fordice of Mississippi and Fob James, Jr. of Alabama declaring that they would not recognize same-sex marriages. *See* State of Mississippi, Office of the Governor, Executive Order No. 770 (Aug. 22, 1996) (same-sex marriage in another state "shall not be recognized as a valid marriage, shall produce no civil effects nor confer any of the benefits, burdens or obligations of marriage . . ."); State of Alabama, Office of the Governor, Executive Order No. 24 (Aug. 29, 1996) (same).

²⁵ Pascoe, *Miscegenation Law*, *supra* note 17, at 44, 49.

²⁶ *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 220–34 (1994).

and energy was nonetheless spent in trying to prevent them from taking place.”²⁷ It appears then that when they defended the prohibition, Southern courts were at least as passionate in their denunciations as modern opponents of same-sex marriage. For example, in 1878 a Virginia court noted:

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.²⁸

The Southern states typically went far beyond the recent legislation prohibiting same-sex marriage, by making interracial marriage a felony. And often it was specifically *marriage*, and not merely interracial sex, that was criminalized. In some states, it was necessary to prove cohabitation in order to convict for miscegenation;²⁹ in others, the prosecutor was required to prove an

²⁷ Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 FRONTIERS 5, 6 (1991).

²⁸ *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878). Similar statements by leading legal authorities are ubiquitous. See, e.g., *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (arguing that the state’s legitimate purposes in prohibiting miscegenation are “to preserve the racial integrity of its citizens” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride”); *Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889) (referring to “the very pronounced convictions of the people of this state as to the demoralization and debauchery involved in such alliances.”); *Pace & Cox v. State*, 69 Ala. 231, 232 (1881), *aff’d*, 106 U.S. (16 Otto) 583 (1883) (“Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.”); *Green v. State*, 58 Ala. 190, 195, (1877) (“And surely there can not be any tyranny or injustice in requiring both [races] alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.”); *State v. Gibson*, 36 Ind. 389, 404 (1871), quoting *Phil. & Westchester R.R. v. Miles*, 2 Am. L. Rev. 358, 358 (Pa. 1867) (“The natural law which forbids their intermarriage and that social amalgamation which leads to corruption of races, is as clearly divine as that which imparted to them different natures.”); W.C. RODGERS, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 49 (1899) (describing the purpose of miscegenation laws as “to keep pure and unmixed the blood of the two races, to the end that the paramount excellence of the one may not be lowered by an admixture with the other.”).

²⁹ For cases reversing convictions on this basis, see, for example, *Gilbert v. State*, 23 So. 2d 22 (Ala. Ct. App. 1945); *Jackson v. State*, 129 So. 306 (Ala. Ct. App. 1930); *Metcalf v. State*, 78 So. 305 (Ala. Ct. App. 1918); *Poland v. State*, 339 S.W.2d 421 (Ark. 1960); *Hardin v. State*, 339 S.W.2d 423 (Ark. 1960); *Wilson v. State*, 13 S.W.2d 24 (Ark. 1929); *Hovis v. State*, 257 S.W. 363 (Ark. 1924); *Wildman v. State*, 25 So. 2d 808 (Fla. 1946). A conviction was affirmed, on evidence that the couple had lived together for many years, in *Parramore v. State*,

actual marriage.³⁰ One conviction was reversed because, although the ceremony had taken place, the officiating notary's commission had expired!³¹

Today, on the other hand, even the states most strongly opposed to same-sex marriage have never attempted to make it a crime to enter into such marriages. Moreover, even before the U.S. Supreme Court invalidated laws against consensual sodomy, they were almost never enforced. It would be hard to argue that the Southern states' public policy against miscegenation was *less* strong than modern public policies against same-sex marriage.

Yet even in this charged context, the Southern states did not make a blunderbuss of their own public policy. Their decisions concerning the validity of interracial marriages were surprisingly fact-dependent. They did not utterly disregard the interests of the parties to the forbidden marriages or of the states that had recognized their marriages, but weighed these against the countervailing interests of the forum. Where those forum interests were attenuated, Southern courts sometimes upheld marriages between blacks and whites.

Three classes of choice of law problems arose involving interracial marriages. The first, "evasive" marriages,³² were cases in which parties had traveled out of their home state for the express purpose of evading that state's prohibition of their marriages, and thereafter immediately returned home. Southern courts always invalidated these marriages. These are the types of cases that are most prominent in debates about recognition of same-sex marriage, but there are two other kinds of cases that have arisen. Second were "migratory" marriages: cases in which the parties had not intended to evade the law, but had contracted a marriage valid where they lived, and subsequently moved to a state where interracial marriages were prohibited. These were the most difficult cases, and the Southern authorities were evenly divided on how to deal with them. Finally, there were "extraterritorial" cases in which the parties had never lived within the state, but in which the marriage was relevant to litigation conducted there. Typically, after the death of one spouse, the other sought to inherit property that was located within the forum state. In these cases, the courts invariably recognized the marriages.³³

88 So. 472 (Fla. 1921). *See also* *State v. Brown*, 108 So. 2d 233, 235 (La. 1959) (statute prohibits "customary or repeated acts of sexual intercourse, and not merely an isolated case of intercourse.").

³⁰ *See Moore v. State*, 7 Tex. App. 608, 609 (1880) ("the fact of marriage is an essential ingredient, and must be positively averred and proved. . . . A mere cohabitation within this State, without a previous intermarriage, does not bring the offence within the statute"); *Frasher v. State*, 3 Tex. App. 263, 280 (1877) (marriage certificate was properly admitted into evidence); *see also Green*, 58 Ala. at 190 (1877) (upholding interracial marriage conviction).

³¹ *Williams v. State*, 125 So. 690 (Ala. Ct. App. 1930).

³² I borrow this useful nomenclature from *Harvard Note*, *supra* note 9, at 2038.

³³ A fourth category of cases did not arise with interracial marriages, but is quite important in the same-sex marriage context: "visitor" marriages, in which the state must ascertain the

The law with respect to "evasive" marriages is quite clear—states have the right to govern their own residents. In the interracial marriage cases, these marriages were almost never recognized.³⁴

This anti-evasion principle was applied, however, only in cases where the parties were domiciliaries of the forum at the time of marriage.³⁵ In "migratory" cases where the couple had been domiciled elsewhere at the time of the marriage,³⁶ and even in one case where they had left the forum before the marriage, intending to reside elsewhere, and after marrying had decided to return to the forum,³⁷ the marriage was held valid.

The difficulty with this rule was, of course, that it meant that the Southern states would have to tolerate some interracial cohabitation within their borders after all. Only two cases arose in which this result was threatened when an interracial couple moved to the forum state, and the courts reached opposite results.³⁸

In *State v. Ross*,³⁹ a white citizen of North Carolina, which prohibited interracial marriage, traveled in May, 1873, to South Carolina, where she married a black man who lived there. At that time, South Carolina did not prohibit interracial marriage. In August of the same year, they both moved to North Carolina, where they were tried for fornication and adultery. A divided state supreme court held that the South Carolina marriage was a valid defense to the charge.

In *State v. Bell*,⁴⁰ a white man and a black woman married in Mississippi, where they then resided,⁴¹ and later moved to Tennessee, where the husband was arrested and tried. He pleaded the Mississippi marriage as a defense. The state supreme court rejected the defense, complaining that under it:

marital status of a person who is merely passing through the state. In such cases, I argue elsewhere, the marriages ought always to be recognized. *See generally* Koppelman, *Interstate Recognition*, *supra* note 23.

³⁴ Koppelman, *Public Policy*, *supra* note 8 at 952–54.

³⁵ Where the parties had different domiciles with different policies at the time of celebration, authority was sparse and the commentators were divided. *See* Rebecca Bailey-Harris, *Madame Butterfly and the Conflict of Laws*, 39 AM. J. COMP. L. 157, 175 (1991).

³⁶ *See, e.g.*, Whittington v. McCaskill, 61 So. 236 (Fla. 1913); Caballero v. Executor, 24 La. Ann. 573 (1872); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948).

³⁷ *State v. Ross*, 76 N.C. 242 (1877).

³⁸ There were also two relevant statutes, also reaching opposite results, but ambiguities in the language of each makes it uncertain whether they even applied to the question of changed domicile.

³⁹ *Ross*, 76 N.C. 242.

⁴⁰ *State v. Bell*, 66 Tenn. 9 (1872).

⁴¹ The reported *Bell* case does not state the parties' domicile, but the same court later described the case as one "where the parties were domiciled in Mississippi at the time of the marriage." *Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889).

we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.⁴²

A federal district court attempted to adjudicate between these competing visions of comity in *Ex parte Kinney*,⁴³ in which a convict in a marriage evasion case sought a writ of habeas corpus in federal court, alleging that his federal rights had been violated. *Kinney* is the only miscegenation case that contains any discussion of constitutional limitations deriving from federalism (rather than from the Equal Protection Clause of the Fourteenth Amendment).

The defendant and his partner had traveled from Virginia to the District of Columbia, married there, and then returned to Virginia, where they were convicted of miscegenation and each sentenced to five years in prison at hard labor. The court held that the marriage was a fraud under the laws of Virginia. It took a hard line on the question that had lately divided the high courts of North Carolina and Tennessee, declaring that Kinney's claim would be rejected even in a closer case, involving "citizens of another state, lawfully married in that domicile, afterward migrating thence in good faith into this state."⁴⁴ The Constitution would not forbid criminal prosecution even then, because "'special privileges enjoyed by citizens in their own states are not secured to them in other states.'"⁴⁵ The right of interracial marriage is "a right legally enjoyed in the District but not given here."⁴⁶

But the court also declared that Virginia could not enforce its law against non-domiciliaries, nor exclude altogether interracial couples domiciled in the District of Columbia. "That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States"⁴⁷ Thus, the only federal authority to reach the issue held that, even conceding a state's right to outlaw interracial marriages, that state was obligated to make reasonable accommodation of those states that held different views on the miscegenation question.

These were the hard cases for the courts interpreting the anti-miscegenation statutes. When the couple had traveled abroad with the intention of evading the forum's restrictions, the case was easy. And when the couple remained in another

⁴² *Bell*, 66 Tenn. at 11.

⁴³ *Ex Parte Kinney*, 14 F. Cas. 602 (C.C.E.D. Va. 1879) (No. 7,825).

⁴⁴ *Id.* at 606.

⁴⁵ *Id.* (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868)).

⁴⁶ *Id.*

⁴⁷ *Id.*

state, and the validity of their marriage happened to come into issue in litigation in the forum, the case was equally easy.

In these "extraterritorial" cases, the marriages were routinely upheld, on the reasoning that, the purpose of the law being the prevention of such cohabitation, no harm would be done by recognizing the marriage after its dissolution by death for purposes of allowing the survivor to inherit the decedent's property in the state, or allowing the children to inherit as legitimate offspring. All deemed it dispositive that their states' laws were not intended to have any extraterritorial application. Typical was the pronouncement of the Mississippi Supreme Court in 1948:

The manifest and recognized purpose of this statute was to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife. Where, as here, this did not occur, to permit one of the parties to such a marriage to inherit property in this state from the other does no violence to the purpose of . . . [the miscegenation laws]. What we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized.⁴⁸

The blanket rule of non-recognition, then, is very nearly unheard of in the United States. (It is nearly unheard of anywhere.)⁴⁹ The *Restatement (Second) of Conflict of Laws* states: "[s]o far as is known, no marriages [valid where celebrated] have been held invalid . . . except by application of the law of a State where at least one of the spouses was domiciled at the time of marriage and where both made their home thereafter."⁵⁰

The most sensible rule would be to follow the lead of the Southern courts. If we suspend, for the sake of the argument, our objections to the substantive laws in question, we may find a certain wisdom in their rules. The Jim Crow judges were horrifyingly wrong about many things, but they did understand the problem of moral pluralism in a federal system, and we can learn something important from the solutions that they devised.

The current wave of anti-same-sex-marriage statutes is not unprecedented. Similar wording was ubiquitous in the miscegenation statutes, which usually declared interracial marriages "void."⁵¹ The cases I have just described, which

⁴⁸ *Miller v. Lucks*, 36 So. 2d. 140, 142 (Miss. 1948).

⁴⁹ See Koppelman, *Public Policy*, *supra* note 8, at 992-1001 (surveying marriage recognition rules in jurisdictions outside the United States).

⁵⁰ Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 955 (1977).

⁵¹ See 3 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS* 204-09 (1931) (compiling statutes). For earlier surveys to the same effect, see Note, *Intermarriage With Negroes—A Survey of State Statutes*, 36 YALE L.J. 858 (1927); I F.J. STIMSON, *AMERICAN STATUTE LAW* 667-69 (1886).

held that the miscegenation laws did not reach extraterritorial marriages not involving cohabitation in the state, all involved statutes using this term.⁵² Even if it is assumed that the new laws prohibit recognition of civil unions, they should not be understood to go farther than the miscegenation laws. If words such as "void" did not mandate blanket recognition in the miscegenation cases, it should not do so in the same-sex marriage cases, either.

The soundest solution to the problem would be to follow the *Restatement (Second)*'s approach to questions of marriage recognition, holding marriages valid unless they violate the public policy of the state having "the most significant relationship to the spouses and the marriage at the time of the marriage."⁵³ However, the rule would also keep couples, who are changing their domicile to a state that has a strong public policy against same-sex marriage, from enjoying the incidents of their marriages, such as a homestead exemption, the right to file a joint state tax return, or the ability to compel an unwilling employer to insure one's spouse.⁵⁴ The marriage would continue to exist as an impediment to any new marriage by either party until it is ended by death, divorce, or annulment. But so long as the couple remained domiciled in Massachusetts, their marriage would be valid everywhere. If a Massachusetts resident visiting Michigan is killed by a drunk driver there, the surviving same-sex spouse should have the right to file a wrongful death suit.

III. THE RULE OF *LAWRENCE*

The argument just offered is an argument from precedent; the most applicable precedents require that same-sex civil unions be recognized under some circumstances. Recently, however, the Supreme Court appears to have elevated precedent to constitutional dignity. And this has implications for the conflicts question.

⁵² See *Caballero v. Executor*, 24 La. Ann. 573 (1872) (LA. CIV. CODE ANN. art. 95 (1838) declared interracial marriages "forbidden," "void," and a "nullity"); *Whittington v. McCaskill*, 61 So. 236 (Fla. 1913) (state constitution declared interracial marriages "forever prohibited" and statute deemed them "utterly null and void"); *Miller*, 36 So. 2d at 141 (state constitution declared such marriages "unlawful and void").

⁵³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 283(2) (1971). Section 283(2) in its entirety states: "[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." *Id.*

⁵⁴ However, if the incident of marriage in question is one that could have been conferred by contract under the forum's law, such as the right to make medical decisions for one's partner, then the state's policy cannot be offended by the mere fact that the couple took advantage of a legal shortcut to that right created by another state's law. See Koppelman, *Interstate Recognition*, *supra* note 23.

I rely on *Lawrence v. Texas*,⁵⁵ but it is not easy to tell what rule the Court is laying down in that case. The statute challenged in *Lawrence* criminalized all homosexual sex. The Court struck it down as an improper infringement on personal liberty. The Court held that the statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,”⁵⁶ but it did not say whether the basis of its holding was the weakness of the state’s interest, the degree of intrusion, or some combination of these. It was not clear whether the Court was applying strict scrutiny, minimal scrutiny, or something in between. It is most obscure which future cases will be affected by the holding of *Lawrence*.⁵⁷

The *Lawrence* Court quotes with approval Justice Stevens’s claim in his *Bowers v. Hardwick* dissent that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”⁵⁸ But the only evidence Stevens cited was the miscegenation laws, which were condemned by an entirely different constitutional principle. Neither he nor any other Justice intends, as Justice Scalia protests in dissent, to invalidate “laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity . . .”⁵⁹ The Court is not saying that morals laws are never permissible.

The *Lawrence* Court does not say that the state interest has no weight, but only that it lacks sufficient weight to justify the burden it places on individual liberty. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁶⁰ But the Court surely is not saying that private conduct between consenting adults is always permissible; otherwise most of the laws on Scalia’s list really would be invalid.

⁵⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁶ *Id.* at 578. Mary Anne Case has observed that the word “which” in this sentence signals that the following clause is non-restrictive, and that non-restrictive clauses do not define the antecedent noun. Thus, one could end the sentence with a period after “interest” without changing its meaning. The meaning would be different if the Court used “that” instead of “which.” Mary Anne Case, *Of This and That in Lawrence v. Texas*, SUP. CT. REV. (forthcoming 2004). This is technically correct, but it is far from clear that the Court was conscious of the distinction between “which” and “that” or meant its word choice to signal that the weakness of the state’s interest was doing all the work in its reasoning.

⁵⁷ When the reasoning of *Lawrence* is scrutinized by a trained logician, the consequences are not pretty. See Richard D. Mohr, *The Shag-a-delic Supreme Court: “Anal Sex,” “Mystery,” “Destiny,” and the “Transcendent” in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L. J. 363 (2004).

⁵⁸ *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

⁵⁹ *Id.* at 590 (Scalia, J., dissenting).

⁶⁰ *Id.* at 578.

Prohibitions of adultery and fornication intrude on the personal and private life of individuals as much as sodomy laws do.⁶¹

More helpful is the Court's reliance on *Romer v. Evans*⁶² to hold that the precedent of *Bowers v. Hardwick*,⁶³ which held sodomy unprotected by the right to privacy, had "sustained serious erosion."⁶⁴ Just how had *Romer* eroded *Bowers*? The Court explained that *Romer* had:

invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.⁶⁵

There is no logical inconsistency between the two cases: the burden on gays in *Romer* was extraordinary, while *Bowers* involved a prohibition of conduct that imposed no punishment on persons who refrained from that conduct.⁶⁶ *Romer* nonetheless was pertinent to *Lawrence*, the Court held, because "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."⁶⁷

The *Lawrence* Court thus suggested that if a law has the *effect* of encouraging prejudice against gay people, this will diminish the weight that is given to the state's purposes when the Court balances those purposes against the burden the law imposes. This gives rise to a new puzzle: why should that effect matter in this way?

Even for African-Americans, the group that receives the highest level of constitutional protection against discrimination, disparate impact without more does not state a constitutional claim.⁶⁸ And, of course, the Court did not hold that laws that discriminate against gays are subject to heightened scrutiny. All criminal laws encourage discrimination against those who violate them; discrimination against those who violate drug laws, for example in the granting of student loans, is increasingly common.

⁶¹ And such laws are occasionally enforced. See RICHARD A. POSNER AND KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 98, 103 (1996).

⁶² *Romer v. Evans*, 517 U.S. 620 (1996).

⁶³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁶⁴ *Lawrence*, 539 U.S. at 576.

⁶⁵ *Id.* at 574 (quoting *Romer*, 517 U.S. at 624, 634 (citations omitted)).

⁶⁶ The consistency of the two cases is argued further in KOPPELMAN, GAY RIGHTS QUESTION, *supra* note 8, at 6-34 (2002).

⁶⁷ *Lawrence*, 539 U.S. at 575.

⁶⁸ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

On the other hand, the Court has said that under certain circumstances, disparate impact can reveal an illicit motive. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."⁶⁹ Moreover, the social meaning of laws can sometimes be relevant to their constitutionality. The Texas statute's impact reveals something about its purpose. The fact that its audience will understand it as an invitation to discriminate is evidence that it was so intended.⁷⁰ And while it is logically possible for persons to discriminate against gays on moral grounds without any animosity toward them, this is a poor description of how anti-gay prejudice actually operates in the contemporary United States.⁷¹

Lawrence is full of language that indicates that the Court is concerned with the subordination of gays as a group, rather than just the liberty of individuals. At issue is the ability of gays to "retain their dignity as free persons."⁷² *Bowers* must be overruled because "[i]ts continuance as precedent demeans the lives of homosexual persons."⁷³ If any sodomy law remains on the books, "its stigma might remain"⁷⁴ even if it is unenforceable. Gay people are entitled to "respect for their private lives."⁷⁵ The state must not "demean their existence or control their destiny."⁷⁶

The Court does not say that *Lawrence* is like *Romer* in that it involves "a bare . . . desire to harm a politically unpopular group."⁷⁷ However, this is the most coherent implication of what the *Lawrence* opinion does say. Moreover, that language does appear in Justice O'Connor's concurrence.

O'Connor would have invalidated the Texas law under the Equal Protection Clause of the Fourteenth Amendment. She observes that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."⁷⁸ Quoting *Romer*, she concludes that the Texas statute "'raise[s] the inevitable inference that the disadvantage imposed is born of

⁶⁹ Vill. of Arlington Heights v. Metro. Dev. Hous. Corp., 429 U.S. 252, 266 (1977).

⁷⁰ See Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777, 779 n.12 (2001).

⁷¹ See KOPPELMAN, GAY RIGHTS QUESTION, *supra* note 8, at 21-25.

⁷² *Lawrence*, 539 U.S. at 558.

⁷³ *Id.* at 575.

⁷⁴ *Id.*

⁷⁵ *Id.* at 578.

⁷⁶ *Id.*

⁷⁷ United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973), *quoted in* *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

⁷⁸ *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

animosity toward the class of persons affected.”⁷⁹ The majority does not expressly embrace O’Connor’s equal protection theory, but it does declare it to be “a tenable argument.”⁸⁰

O’Connor’s reasoning would explain what is left mysterious by the majority opinion: why the state interest is deemed insufficient to justify the burden on liberty here, though it would be sufficient in other cases where the law bans consensual conduct between adults. In those cases, there is no reason to think that there is animosity toward the persons affected, or a bare desire to harm a politically unpopular group. The prejudice against gay people evidently is what changes the equation in *Lawrence*.

This is not much of a principle to decide future cases with, though. The “bare desire to harm” criterion seems even more malleable than the liberty that the majority opinion purports to rely on. Just how does one decide which unequal treatment is the result of hostility and which has a rational basis?

The trouble is that laws that discriminate against gays often *both* express moral disapproval *and* reflect a desire to harm an unpopular group.⁸¹ If the analysis of *Lawrence* I have just offered is correct, the rule now seems to be that courts must determine, on a case-by-case basis, which is the primary purpose of any such law. This leaves plenty of room to cook the books when this is felt to be necessary to accommodate irresistible political forces. The exclusion of gay people from marriage and the army, both of which the Court seems disinclined to disturb, largely rest on primitive revulsion, and the refusal to recognize same-sex marriage rests on similarly dubious motives, but the Court does not need to admit any of this in order to uphold these exclusions (or, more likely, to refuse even to examine them).⁸²

This is not to say that *Lawrence* produces no rule of law at all. Part of what troubled the Court in *Lawrence* was the fact that sodomy laws singling out gays are a fairly recent development in the law, only arising in the 1970s.⁸³ Similarly in *Romer*, the Court was troubled that the challenged disqualification “is unprecedented in our jurisprudence,” and it declared that “[i]t is not within our constitutional tradition to enact laws of this sort.”⁸⁴ Extraordinary burdens, it appears, arouse suspicion.

⁷⁹ *Id.* at 583 (quoting *Romer*, 517 U.S. at 634).

⁸⁰ *Id.* at 574.

⁸¹ See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RIGHTS J. 89 (1997) [hereinafter, Koppelman, *Invidious Intent*], reprinted in KOPPELMAN, GAY RIGHTS QUESTION, *supra* note 8, at 6–34.

⁸² Better to refuse to hear a case than to decide it wrongly. See Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 162–64 (1988).

⁸³ See *Lawrence*, 539 U.S. at 570.

⁸⁴ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

This suggests that one clear rule emerges from (but probably does not exhaust) the fog of *Lawrence*: if a state singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.⁸⁵

IV. WHY BLANKET NON-RECOGNITION IS UNCONSTITUTIONAL

A blanket rule of non-recognition for same-sex marriage would have extraordinary implications. Consider the position of the same-sex couple who make their home in Massachusetts, Vermont, or California. They do not seek to evade any other state's laws. They simply have done what their own state's laws authorize them to do. What is their status to be within the federal system?

The blanket non-recognition rule would place such a couple in a difficult position. They would lose all the rights arising out of their marriage as soon as they crossed the border into any state that had such a rule. Moreover, even if they never left home, they would be treated as unmarried if their status should become relevant to litigation that takes place in another state.

The consequences would be harsher than any proponent of non-recognition probably contemplated. To begin with the most extreme case: Suppose a lesbian couple is married and raising a child together in Massachusetts, and that the child's biological mother takes the child on a weekend trip to another state.⁸⁶ While there, the mother and child are both seriously injured in an automobile accident. As soon as she learns the news, the other spouse flies to the state where the accident occurred and soon arrives at the hospital. Under the blanket non-recognition rule, this is what she would be told: "You may not visit either of these patients, because only family members may visit patients here, and you are not a family member of either of these people in any respect which our state

⁸⁵ This analysis of *Lawrence* is developed in greater detail in Andrew Koppelman, *Lawrence's Penumbra*, 88 MINN. L. REV. 1171 (2004).

⁸⁶ Vermont and California, in nearly identical language, provide that the child of either party to a civil union shall be regarded as the child of both. See 23 VT. STAT. ANN. tit. 15 § 1204(f):

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

Id.; CAL. FAM. CODE § 297.5(d):

The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

Id. An obvious consequence is that, in order for the spouse of the biological mother to assert parental rights in a legal proceeding, he or she must plead the existence of the civil union.

recognizes. You may not participate in medical decisions for either of them.” The spouse may further hear that “if the mother dies, you will not have any parental rights in the child. If there is no surviving biological relative, we will regard the child as an orphan, and place him in an orphanage.”

This would be a bizarre rule. None of the various approaches to conflict of laws that is followed in the United States requires this result, although each is uncertain enough that it cannot be foreclosed.⁸⁷ All one can say is that no other type of marriage in American history has been treated so badly.

One might respond that this treatment is appropriate because of the novelty of same-sex marriage. “[I]f one is uncomfortable with affording same-sex unions the same status as traditional marriages, one will likely reject the suggestion that same-sex marriages should be governed by the same recognition principles. Instead, one will view them as a fundamentally new arrangement to which the marriage precedents do not apply.”⁸⁸ But the same claim might have been made on behalf of the laws the Court invalidated in *Romer* and *Lawrence*. Anti-discrimination protection for gays, which the law invalidated in *Romer* sought to nullify, is also a novelty. And sodomy laws targeting gays arose in response to another historical novelty, an active gay rights movement. If the novelty of the situation to which the legislature was responding was not enough to save the law in those cases, it should not suffice here, either.

If my interpretation of *Lawrence* is correct, then the unprecedented character of a blanket rule of non-recognition has constitutional implications. Such a rule would manifest unconstitutional animus toward gay people. However much states may dislike same-sex marriages, they must treat them less harshly than this.⁸⁹

Thus far there is little case law on recognition of foreign same-sex unions, and what there is involves the consequences of evasion. For example, a New

⁸⁷ See generally Whitten, *supra* note 7.

⁸⁸ *Harvard Note*, *supra* note 9, at 2050–51.

⁸⁹ Mary Anne Case has suggested in conversation that *Lawrence* adds little to this analysis, and that the same result could be reached on the basis of *Romer*. A blanket rule of non-recognition, she argues, resembles the law invalidated in *Romer* in that it “has the peculiar property of imposing a broad and undifferentiated disability on a single named group” *Romer*, 517 U.S. at 632. This understates the ambiguity of *Romer*. It has been plausibly argued that the law invalidated in that case resembled a bill of attainder, inasmuch as it penalized gays simply for being who they are. See Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203 (1996). But see Koppelman, *Invidious Intent*, *supra* note 81, at 120. The blanket non-recognition rule may be a broad disability, but it does not “identif[y] persons by a single trait and then den[y] them protection across the board.” *Romer*, 517 U.S. at 633. It could not reasonably be called a bill of attainder: it identifies its objects by a possibly transient legal status rather than an ineradicable element of identity, and one can escape its burdens simply by terminating one’s same-sex marriage. The law in *Lawrence* likewise penalized persons for what they did, not for who they were. *Lawrence* thus invalidates a larger set of laws, or invalidates them more certainly, than *Romer* does. A blanket non-recognition rule is part of that larger set.

York court found that the surviving spouse in a Vermont civil union could bring a wrongful death action.⁹⁰ A Georgia court declined to recognize a Vermont civil union in a case in which both parties were Georgia domiciliaries, though the court did not notice the significance of domicile.⁹¹ A Connecticut court construed Connecticut law to deny it subject matter jurisdiction to dissolve a Vermont civil union entered into by a Connecticut domiciliary.⁹² The last two cases included language that suggested a blanket rule of recognition, but they did so unreflectively, without noticing the practical or constitutional difficulties that such a rule would entail. Two judges, in Massachusetts and Iowa, each approved uncontested dissolutions of Vermont civil unions.⁹³ The question of migratory or extraterritorial civil unions has not yet arisen.

V. CONCLUSION

The domicile-based approach to marriage recognition is obviously unsatisfying to both sides of the debate. Those who object to same-sex marriage do not want it ever to be recognized in any context. Gay rights supporters have reasons of their own to be discontented. Most gay Americans who are in enduring, committed relationships and who wish to marry do not live in Massachusetts, Vermont or California and will not move to any of those states. But this underestimates the value for gays of having same-sex marriages legally recognized, at least for certain purposes, in every state. An important message is sent when courts nullify *all* same-sex marriages, even those in which their states have no legitimate interest. An equally important message is sent when they refrain from doing that.⁹⁴ This is not as much recognition as some hope for, but it is what the law now calls for. If you do not like it (I do not like it either), you had better try to change the law.

⁹⁰ *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003).

⁹¹ *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

⁹² *Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002).

⁹³ *Salucco v. Alldredge*, 17 Mass. L. Rptr. 498 (Mass. 2002); Frank Santiago, *Iowa Judge OK's Lesbian Divorce*, DES MOINES REGISTER, Dec. 12, 2003, at 1A.

⁹⁴ On the value of state action that seeks to alter the social status of unfairly stigmatized groups, see generally ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996).